Supreme Court of the United States

OCTOBER TERM, 1947

NO. 290

JAMES M. HURD, AND MARY I. HURD,
Petitioners,

vs.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Respondents deem the following statement, supplementing that contained in Petitioners' brief, essential to place the facts fully before the Court.

Petitioner Urciolo, a real estate speculator, sold and conveyed premises 126 and 144 Bryant Street, N. W., to Negroes *after* the issuance of the Injunction, which includes these properties in its provisions, and in violation thereof (R. 451, 452).

The 100 block of Bryant Street, Northwest, had not changed as to ownership or occupancy for 20 years. The twenty properties adjoining First Street were all under the deed covenant (R. 380), and were part of a large White territory running from the Soldiers Home to T Street, between First Street, N. W., and Lincoln Road (R. 72), "consisting of approximately 1000 homes, churches and business properties, exclusively occupied by persons of the White race, under similar agreements or deed covenants." (*Mays v. Burgess, et al.*, 80 App. D. C. 238, 152 F. (2d) 123.) The remaining eleven properties were under no covenant and had been owned and occupied by Negroes for 20 years (R. 381).

The north side of Bryant Street is the southern boundary of McMillan Park Reservoir; immediately west of the 100 block of Bryant Street is the District of Columbia Pumping Station and a garage on the north side of the street, and a Water Department stock yard and garage on the south side. No change or trend as to Negro ownership and occupancy is possible except in the deed covenanted properties. (R. 23.)

Petitioners make numerous references to cases arising under municipal ordinances, state legislation, opinions of courts in ministerial roles, national treaties, citing also the Charter of the United Nations, a presidential statement and the dissenting opinion in the instant case, (based largely on the sociological views of the dissenting Justice)—none of which are pertinent to the legal questions in the pending cases, *which arise solely under the private actions of individual citizens in relation to their private property.* We shall therefore emphasize only those points which are controlling in urging the denial of the Writ of Certiorari in these cases.

I. No Constitutional or Other Federal Question of Substance is Involved.

No question of substance relating to the construction or application of the Constitution or statutes of the United States is involved in this case.

In *Corrigan* v. *Buckley*, 271 U. S. 323, 70 L. ed. 969 (55 App. D. C. 30, 299 F. 899), this Court had presented to it at length both the presumed questions of constitutional and statutory construction and the question of general law involved in a similar Negro covenant case, and dismissed the appeal on the ground that no questions were involved under the Fifth, Thirteenth and Fourteenth Amendments to the Constitution, and that the construction of Sections 1977, 1978 and 1979, Revised Statutes of the United States, was not drawn in question. No action of any public authority subject to constitutional or statutory prohibitions is in any way involved in this case. This Court there said:

> "It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void. And, plainly, the claim urged in this Court that they were to be looked to, in connection with the provisions of the Revised Statutes and the decisions of the courts, in determinating the contention, earnestly pressed, that the indenture is void as being 'against public policy,' does not involve a constitutional question within the meaning of the Code provision."

The suggestion made in petitioners' brief (pp. 12 and 25) that there is a question involving the construction of a Federal statute, to wit: section 42, Title 8 of the United States Code (formerly Section 1978 of the Revised Statutes) is entirely without support in the record. This question has not been raised or suggested in the courts below and there is no action of any public authority subject to the terms of the statute in any way depriving petitioners of their right to purchase, sell, and hold real and personal property. The

limitation which excluded petitioners, as the Court below held, from holding and occupying certain pieces of property in the District of Columbia, was entirely a matter of private contract between adjoining and neighboring land owners.

With reference to a similar contention in *Corrigan* v. *Buckley*, (*supra*) this Court said:

> "Assuming that this contention drew in question the 'construction' of these statutes, as distinguished from their 'application,' it is obvious upon their face that while they provide, *inter alia*, that all persons and citizens shall have the equal right with white citizens to make contracts and acquire property, they, like the Constitutional Amendment under whose sanction they were enacted, do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property. There is no color for the contention that they rendered the indenture void; nor was it claimed in this Court that they had, in and of themselves, any such effect."

II. No Question of Large Public Concern is Involved.

Petitioners apparently contend in their brief that the question of whether this covenant is void because contrary to the public policy of the District of Columbia is a question of large public concern which has not been, but which should be decided by this Court, under correct principles of equity jurisprudence.

(a) The Covenant is Not Against the Public Policy of the District of Columbia.

The question of whether these deed covenants affected certain pieces of real estate located in the District of Columbia and were enforceable by injunction against persons owning and occupying said land in violation of the covenants is one of local law, and the only public policy involved is that of the District of Columbia. A decision on the question cannot have any effect on the law of real property which

may be located in other states or jurisdictions. While there is no substantial diversity in the various states, each state court has treated the question as one of the local law of real property, to be governed by its own principles. *There are no conflicting Federal decisions on the question, and it arises in the U. S. Court of Appeals for the District of Columbia only through the local jurisdiction of that court and not as involving any Federal right.* The public policy of the District of Columbia, like that of any state affecting such questions, is that fixed by applicable statutes and declared by the highest court of the jurisdiction. What its public policy is and what does or does not conflict with it, cannot be a question of general importance. See *Hartford Fire Ins. Co.* v. *Chicago, etc. Ry.*, 175 U. S. 91, 100.

The Court of Appeals of the District of Columbia is the highest court of an important and thickly populated territorial subdivision of the United States. Congress through the Judicial Code, Section 240 (28 U. S. Code Sec. 347 c) has seen fit to make its judgments final and not reviewable by writ of error or appeal, but only by certiorari, thus making its decisions on questions of local law, such as are involved in this case, equivalent to similar decisions of the highest courts of the states.

Respondents respectfully call the Court's attention to the following excerpt from the decision of the Court of Appeals in the case of *Mays* v. *Burgess, et al.*, 79 App. D. C., P. 347-8; (cert. denied 325 U. S. 868, 89 L. ed. 1987, involving a similar Restriction:

> "Little need now be said on the subject of that (public) policy. The proposition is not new and was unsuccessfully urged in the Corrigan case, *supra*, in this court and in the Supreme Court. And nothing is suggested now that was not considered then. The Constitution is the same now as then, and we are cited to no new public laws, nor indeed to any other course or practice of Government officials, which the *private* action of the original owners of the block in question contravenes. And the public policy of a State of which courts take notice and to which they give effect must be deduced—in the main—from these sources.

Surely it may not—properly—be found in our personal views on sociological problems. As to the District of Columbia, we must take judicial notice of the fact that separate schools are established for the white and colored races; separate churches are universal and are approved by both races; and that in the present local housing emergency, large amounts of public and, perhaps also, of private funds have been expended in the establishment of homes for the separate use of white and colored persons. And these accepted practices are not intended to and should not be considered to imply the inferiority of either race to the other." (Italics supplied.)

(b) The Indenture Does Not Constitute an Unlawful Restraint on Alienation.

Petitioners in their brief seem to lay no stress on the contention that the covenant constitutes an unlawful restraint on alienation. Respondents therefore merely call attention to the opinion of Mr. Justice Fields in *Cowell* v. *Colorado Springs Co.*, 100 U. S. 55, 25 L. Ed. 547, sustained in *Potter* v. *Couch*, 141 U. S. 296, 315, and cited in all cases on this subject; the deed covenant here involved, and similar restrictive agreement covenants, do not constitute an unlawful or undue restraint on alienation.

III. Action in the Courts is Proper and Essential for Law-Abiding Citizens to Obtain Equal Protection of the Laws.

Petitioners urge that the courts cannot enforce such deed covenants or restrictive agreements, because the Judiciary is a branch of the Government, and cite in support of the proposition the case of *Buchanan* v. *Warley*, 245 U. S. 60, a Kentucky case. There appears to be no need to do more than quote the portion of the opinion conceded by petitioners to state the issue, and observe that reliance on this case makes it obvious that appellants have "misconceived the real question here involved":

"The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, *be inhibited by the State, or by one of its municipalities*, solely because of the color of the proposed occupant of the premises?" (Italics supplied.)

The contention is not new. In 1924 this proposition was urged in the *Corrigan-Buckley* case, (*supra*), in 1942 the appellants in *Hundley* v. *Gorewitz* (77 App. D. C. 48), and in 1944 the appellants in *Mays* v. *Burgess* (79 App. D. C. 343) made the same contention, and again in the instant case, before the Court of Appeals. Although urged strongly in each case, the point was ignored by the Court.

While it may be argued that courts will not recognize or enforce contracts against public policy, in the absence of such objection the courts are the only place where law abiding citizens may obtain equal protection of the laws and save themselves from being deprived of their property without due process of law. This is exactly what the respondents here did when they filed this suit to enforce their contract. We quote from the opinion of the Court of Appeals in *Mays* v. *Burgess* (*supra*):

"In the case we have the parties, as they declared, contracted for their mutual benefit and in the interests of the neighborhood not to permit their land to be sold to, or used by, persons of the Negro race, and made this covenant binding upon their heirs and assigns. The form of the covenant is immaterial and it is not necessary it should run with the land. 'A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding upon him merely because he stands as an assignee of the party who makes the agreement, but because he has taken the estate with notice of a valid agreement concerning it which he cannot equitably refuse to perform.' *Bryan* v. *Grosse*, 155 Cal. 132, 99 P. 499. And likewise in *Codman* v. *Bradley*, 201 Mass. 561, 87 N. E. 591, it was said:

'It is plain from the language of the indenture that the parties intended a restriction upon each of

the five lots in favor of the owners of lots 176 and 177, and their heirs and assigns, which should be for the benefit of the lots, whoever might be the owners of them. It is equally plain that equity will enforce such a restriction. It is not important to determine whether the instrument created a legal estate in the five lots, or precisely what legal estate is created, if any. It created a right enforceable in equity against all persons taking with notice of it, actual or constructive, and this equitable right is in the nature of an easement, even if it rests on no broader principle than that equity will enforce a proper contract concerning land, against all persons taking with notice of it. [Citing cases.] In the present case it plainly appears that the intention of the parties was that their respective promises should be for the benefit of the promisees as owners of the neighboring land, and of subsequent owners of these lots. Such a promise may always be enforced in equity by an owner.' "

IV. The Decision of the Court Below is Correct and in Accord with the Decisions of this Court.

In conclusion we quote from the opinion of the Court of Appeals in the pending case:

"The validity of the restrictive deed covenant before us now has been upheld by this Court on numerous occasions. *Torrey* v. *Wolfes*, 56 App. D. C. 4, 6 F. (2d) 702; *Cornish* v. *O'Donoghue*, 58 App. D. C. 359, 30 F. (2d) 983, cert. denied, 279 U. S. 871; *Grady* v. *Garland*, 67 App. D. C. 73, 89 F. (2d) 817, cert. denied, 302 U. S. 694; *Hundley* v. *Gorewitz*, 77 U. S. App. D. C. 48, 132 F. (2d) 23, wherein we said: 'In view of the consistent adjudications in similar cases, it must now be conceded that the settled law in this jurisdiction is that such covenants as this are valid and enforceable in equity by way of injunction.'

"Similarly, restrictive covenants expressed in agreements between the owners of land have been upheld by this Court in the following cases: *Corrigan* v. *Buckley*, 55 App. D. C. 30, 299 Fed. 899, appeal dismissed 271 U. S. 323; *Russell* v. *Wallace*, 58 App. D. C. 357, 30 F. (2d) 981, cert. denied, 279 U. S. 871; *Mays* v. *Burgess*,

79 U. S. App. D. C. 343, 147 F. (2d) 869, cert. denied, 325 U. S. 868, rehearing denied 325 U. S. 896.

"The appellants here have presented no contention that is not answered by those decisions."

The decision of the U. S. Court of Appeals for the District of Columbia not only agrees with the settled rule of property in this District, established by many prior decisions, but is in agreement with the settled principles of law applicable which have been recognized from the time of Lord Coke to the present. The decision below agrees exactly with the cases in this Court, above cited, which have dealt with this question. Four times this Court has denied Certiorari, since its decision in *Corrigan v. Buckley* (*supra*), when Petitions involving the identical or similar restrictive covenants have been sought.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied.

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